United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1026

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1026

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UNITED STATES OF AMERICA,
Appellee,

—v.—

FRED J. ZEEHANDELAAR,
Petitioner-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

JAC M. WOLFF
Attorney for Petitioner-Appellant
655 Madison Avenue
New York, New York 10021
(212) 688 - 7200

HENRY J. BOITEL,
Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1026

UNITED STATES OF AMERICA,

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—v.—

FRED J. ZEEHANDELAAR,

Petitioner-Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Preliminary Statement

Fred J. Zeehandelaar petitions the Court for rehearing (F.R.A.P., Rule 40) and suggests rehearing en banc (F.R.A.P., Rule 35).

Following a jury trial, petitioner, an importer of wild animals, was convicted of having made a false statement to the Department of Interior, Bureau of Sport Fisheries and Wildlife (18 U.S.C. § 1001). This Court reversed the conviction upon the ground that the indictment failed to contain a sufficient statement of the essential facts constituting the offense charged, resulting in "substantial uncertainty . . . which pervaded the trial and the deliberations and verdict of the jury. . . ." *United States* v. *Zeehandelaar*, 498 F.2d 352 (2d Cir., 1974).

Thereafter, on September 27, 1974, the Government sought a superseding indictment from the *September*, 1974 grand jury, charging the defendant with the violation pre-

viously charged and, in a second count, with having given perjurious testimony at the first trial. The grand jury refused to indict and voted a "no true bill."

On October 1, 1974, the Government re-presented the case, but to a different grand jury—the *October*, 1974 grand jury. The grand jury returned an indictment which was filed on October 2, 1974.

The superseding indictment was in two counts (A. 5).* Count I charged that on June 8, 1972, the petitioner had submitted an importation application and other documents to the Bureau of Sport Fisheries and Wildlife in which he falsely claimed that a certain letter and a certain check had been written on January 17, 1972. The second count charged that certain testimony given by the defendant at the trial of the prior indictment had been perjurious.

Prior to trial, and upon motion of the defense, the trial court ordered a severance of the two counts and directed that the parties proceed to trial as to the perjury count (A. 311-12). Defense motions for a dismissal of the perjury count were denied.

Also prior to trial, and over the objection of the defense, the Court directed that certain portions of the specification of perjury be stricken from the indictment as being immaterial surplusage (A. 341). The trial proceeded upon the basis of an amended indictment (A. 9).

The jury returned a verdict of guilty as to the perjury count, and, on January 3, 1975, the Court entered judgment against the petitioner as follows:

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* References preceded by "A" are to the Appellant's Appendix filed in this Court with respect to the instant appeal. References preceded by "B" are to the Appendix filed in this Court with respect to the prior appeal, which resulted in the reversal of the petitioner's prior conviction.

"Imposition of sentence is suspended. Defendant is placed on unsupervised probation for a period of one (1) year upon condition that he pay $5,000 to the Department of Interior which shall be used in connection with preservation of endangered species, payment to be arranged by Probation Department.

"In the event an appeal is filed, probation is stayed pending such appeal.

"Count I is dismissed on motion of the Government made pursuant to Rule 48(a) F.R.Cr.P." (Judgment, A. 1302; to the same effect *see* minutes of sentence at A. 1294-9).

A notice of appeal to this Court was timely filed (A. 1315). The appeal was perfected, and oral argument was heard on April 24, 1975.

On May 7, 1975, this Court entered an Order directing that the judgment of conviction be modified, but affirmed the judgment in all other respects. (Appendix A, hereto.)

Questions Presented for Rehearing and Rehearing En Banc

1. Did the trial court improperly, over defense objection, permit an amendment of the indictment which materially changed the substance, theory and text of the allegations of perjury?

2. Was the text of the grand jury indictment, both as filed and as amended, so confused, misleading and ambiguous in its specification of perjury, that the defendant was deprived of due process of law and of his right to be tried upon a grand jury indictment?

3. Was the defendant deprived of a fair trial by comments of the prosecutor, in summation, which placed his own credibility in issue, vouched for the credibility of prosecution witnesses, and utilized alleged facts which had not been the subject of proof?

4. This Court has held that the District Court was without authority to impose upon the defendant, as a condition of probation, the requirement that he pay $5,000 to the Department of Interior for use in connection with the preservation of endangered species. This Court has, however, ruled that the judgment may be amended to provide for the payment of a $5,000 criminal fine in lieu of the illegal provision. Would such an amendment be an improper increase of the legal portion of the original judgment?

Summary of the Facts*

In December, 1971, there existed a belief that the Department of Interior might soon place the cheetah on the endangered species list. If that eventuality were to come about, importation of cheetahs would no longer be permitted except in instances of economic hardship such as where it could be shown that there was a pre-existing importation contract, or if the importation was for the purpose of propagation (A. 14-15). On March 30, 1972, the cheetah was officially placed on the list (A. 14-15).

On June 8, 1972, Zeehandelaar applied for an importation permit and attached to his application two documents which he has since admitted were backdated. Although the application was subsequently withdrawn in October, 1972, Zeehandelaar was indicted on December 6, 1972 upon the charge of making false statements to the Department of Interior (18 U.S.C. § 1001). As noted *supra*, pp. 1-2, this Court reversed his conviction on that charge.

At the trial which led to the reversed conviction, Zeehandelaar testified in his own behalf. At that same trial, the government attempted to prove under the "similar act" theory that, on a different occasion, unrelated to the

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* The facts of the prior prosecution are set forth at some length in this Court's opinion which reversed the defendant's conviction, *United States* v. *Zeehandelaar*, 498 F.2d 352 (2d Cir., 1974).

facts of the indictment, Zeehandelaar had offered to backdate a contract for the purpose of circumventing the importation prohibition.

In April, 1972, Melvin Lovell and Frank Gilbert, neither of whom knew Zeehandelaar, were interested in acquiring a pair of cheetahs. On April 15, 1972, Lovell placed a telephone call to Zeehandelaar, who was attending a conference of zoo directors in Tucson, Arizona. Lovell's version of that conversation is that, after he told Zeehandelaar about the desire for a pair of cheetahs, Zeehandelaar said he could probably meet with Lovell in Tucson to further discuss the matter (A. 511). When, at the first trial, Zeehandelaar was questioned about that conversation, he responded that he told Lovell about the requirements which must be met by a permittee said:

> 'I told him also that I didn't consider such permission to be likely to be given to me after I had the Kingdom permit because I would have to provide a contract or an order for Mr. Lovell, entered into for whatever he wanted, prior to the effective date that the cheetah was placed on the endangered species list.
>
> "Since we didn't have such a contract, since he didn't and I didn't have such a contract, I told him it was unlikely that such permission, after I received the permit of, let's use the word, switching animals, would be granted.
>
> 'He then asked me what if I sign a contract dated in March. And I said 'Sorry, that can't be done.'
>
> "The conversation ended by me telling him that since he is in Phoenix, and identified myself as being in Tucson, Arizona, which is only 65 miles, 70 miles away, I advised him that I would be on the program in the Phoenix Zoo on an organized tour on Tuesday, April 18, and I suggested to him that if he wants to talk to me again he might take the

opportunity of looking me up while we were at the Phoenix Zoo.

"That was the end of the conversation."

Q. The telephone conversation?
A. The telephone conversation." (B. 380-1)

According to Lovell, he and Gilbert traveled to the Arizona Inn in Tucson, where the defendant was staying, and encountered the defendant in the lobby of the hotel. Lovell claimed that, during the conversation which ensued, Zeehandelaar suggested that the two cheetahs could be obtained by backdating an order so as to make it appear that it had been written prior to the effective date of the importation restriction. Lovell allegedly rejected the proposal, and all contact with Zeehandelaar was terminated (A. 522). Gilbert, who also testified on behalf of the government, only recalled that the meeting had occurred, but could not recall any offer by the defendant to backdate an order or to take animals from a different order. He did recall that the defendant was in a rush to get to another meeting (A. 698-712). Zeehandelaar's prior trial testimony was in accord with these last noted recollections of Gilbert, and he denied ever suggesting to Lovell that an order be backdated (B. 384).

POINT I

The defendant's right to be tried only upon a grand jury indictment was violated by: (1) the deceptive and misleading manner in which the specifications of perjury were set forth in the indictment, and (2) the amendment of the indictment over the objection of the defense.

In view of the space limitations imposed upon this petition for rehearing, we must set forth our contentions in summary manner. We respectfully refer this Court to

Point I of our main Brief on appeal (at pp. 11-31), and Points I and II of our Reply Brief on appeal (at pp. 2-8). Annexed to our Reply Brief on appeal, is a chart which is labeled Supplemental Appendix E. That chart sets forth in one column the complete first trial testimony of the defendant with regard to the subject matter of this perjury indictment. A second adjoining column sets forth that portion of the defendant's testimony which is specified as being perjurious in the indictment as returned by the grand jury. It shows, *inter alia*, that in drafting the indictment the prosecution edited the testimony of the defendant without giving any indication that it was doing so. A third adjoining column sets forth that portion of the defendant's testimony which remained in the indictment after other portions had been deleted by the Court over the objection of the defense.

The amended indictment, as passed upon by the trial jury herein, makes it appear as though the defendant was charged with having given a perjurious version of the conversation which he had with Lovell and Gilbert at the Arizona Inn. In fact, the version of events given by the defendant related to the subject matter of his telephone conversation with Lovell. That fact is made crystal clear by the actual testimony (Column I) and by the indictment as originally returned by the grand jury (Column II).

In our main Brief on appeal, at pp. 21-2, we set forth several concrete demonstrations of the manner in which the trial Court and jury were misled by the amended indictment, and the manner in which the prosecution's presentation of evidence, shifted the focus of the allegedly perjurious testimony from the telephone conversation to the Arizona Inn conversation. For example, the government was permitted, over objection, to ask its witness Gilbert whether he had ever heard the defendant make certain statements. The government quoted those state-

ments directly from the amended indictment—they all related to the telephone conversation between the defendant and Lovell. By making it appear as though they related to the meeting at the Arizona Inn with Lovell and Gilbert, the amended indictment and the government's tactics thoroughly perverted the defendant's testimony.

It is respectfully submitted that in failing to come to grips with this problem, this Court has deprived the appellant Zeehandelaar of the benefit of the Supreme Court's holdings in *Ex Parte Bain*, 121 U.S. 1, 4 (1887), *Stirone* v. *United States*, 361 U.S. 212, 217 (1960), *Russell* v. *United States*, 369 U.S. 749, 770 (1962), and the other authorities cited at page 29 of our main brief on appeal.

POINT II

The appellant Zeehandelaar was deprived of a fair trial and of his Fifth Amendment right against self-incrimination when, in summation, the prosecutor placed his own credibility in issue, vouched for the credibility of prosecution witnesses, resorted to alleged facts not in the record, and effectively commented upon the defendant's failure to testify.

In his summation, the prosecutor argued that the defendant had a motive to lie, whereas the government's witnesses did not have such a motive because "they were not involved in the prior case. They were not the subjects of investigation, and they were not the defendant." (A. 1146) The prosecutor further vouched for the credibility of his witnesses by arguing, without any support in the record, that those witnesses had "no criminal record, no prior involvement with the law." (A. 1145)

Additionally, the prosecutor continually asserted in summation that the government's witnesses had not been

contradicted and that they had been the only witnesses "who testified here in front of you." (A. 1132, 1142, 1151).

Not content with having thus improperly vouched for the credibility of his witnesses, the prosecutor repeatedly asserted that their testimony was true (A. 1124).

Defense motions for a mistrial and for a remedial instruction were all denied in all respects with regard to the above noted improper comments of the prosecutor (A. 1146, 1154, 1164).

For the reasons set forth at pp. 31-35 and 38-41 of our main brief, it is respectfully submitted that the prosecutor's comments in summation mandate a reversal of the appellant's conviction. That conclusion is compelled by this Court's holdings in *United States* v. *Drummond*, 481 F.2d 62 (2d Cir., 1973), *United States* v. *Bivona*, 487 F.2d 443 (2d Cir., 1973), *United States* v. *White*, 486 F.2d 204 (2d Cir., 1973), *United States* v. *LaSorsa*, 480 F.2d 522 (2d Cir., 1973), *United States* v. *Dioguardi*, 492 F.2d 70, 81 (2d Cir., 1974), and the holding of the Seventh Circuit in *United States* v. *Handman*, 447 F.2d 853 (7th Cir., 1971).

POINT III

The concededly illegal portion of the sentence imposed upon the defendant is void. Any attempt to substitute in its place a fine not contained in the original sentence would constitute an impermissible increase of the valid portion of the original sentence.

The Order of this Court which affirmed the judgment of conviction herein in other respects, also provided that:

> "[I]t was improper for the trial court to order appellant to pay a sum to the Department of In-

> terior, 'which shall be used in connection with the preservation of endangered species. . . .' Such a forced contribution is an improper sentence. Accordingly, we affirm in all respects except as to the sentence imposed, and we remand to the lower court solely for resentencing; any fine imposed upon such resentencing may not exceed five thousand dollars, the amount of the contribution originally imposed." (Appendix A hereto).

It is respectfully submitted that the only remedy available for the correction of the sentence is the deletion of that part of it which was illegal. A conversion of the illegal five thousand dollar ($5,000) contribution into a five thousand dollar ($5,000) fine would be an impermissible increase in the valid portion of the sentence. *See*: *Owensby* v. *United States*, 385 F.2d 58 (10th Cir., 1967) and *Pugliese* v. *United States*, 353 F.2d 514 (1st Cir., 1965).

CONCLUSION

For all of the above reasons, the petition for rehearing or the suggestion of rehearing in banc, should be granted, and upon rehearing, the judgment of conviction ought be reversed; alternatively, the Order of Affirmance of this Court should be amended.

Respectfully submitted,

JAC M. WOLFF
Attorney for Petitioner-Appellant

HENRY J. BOITEL,
Of Counsel.

APPENDIX A

(Order of Affirmance)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1026

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of May, one thousand nine hundred and seventy-five.

Present:

J. EDWARD LUMBARD
PAUL R. HAYS
WILLIAM HUGHES MULLIGAN
Circuit Judges

UNITED STATES OF AMERICA,

Appellee,

—against—

FRED J. ZEEHANDELAAR,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix A—Order of Affirmance

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed except as to the sentence imposed. None of the other arguments raised on appeal has merit; however, it was improper for the trial court to order appellant to pay a sum to the Department of Interior, "which shall be used in connection with the preservation of endangered species. . . ." Such a forced contribution is an improper sentence. Accordingly, we affirm in all respects except as to the sentence imposed, and we remand to the lower court solely for resentencing; any fine imposed upon such resentencing may not exceed $5,000, the amount of the contribution originally imposed.

/s/ J. EDWARD LUMBARD
J. EDWARD LUMBARD

/s/ PAUL R. HAYS
PAUL R. HAYS

/s/ WILLIAM HUGHES MULLIGAN,
WILLIAM HUGHES MULLIGAN, USCJs

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